

Office Supreme Court, U.S.
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U.S. SUPREME COURT

IN RE

Supreme Court of the United States

October Term, 1961

Argued

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Supreme Court of the United States, U.S. Appellate,

INTERSTATE COM-
MUNICATIONS SHORT LINE

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INTERSTATE COM-
MUNICATIONS SHORT LINE
of
and Regulators of

INTERSTATE COM-
MUNICATIONS SHORT LINE

U.S. SUPREME COURT DISTRICT COURT FOR
U.S. SUPREME COURT DISTRICT OF ILLINOIS

Supreme Court of the United States

Robert A. Nelson
J. Lee Robinson
Edward W. Tamm
One South La Street
Chicago, Illinois
Chicago 4, Ill.

Attorney for the Appellee,
National State Line Car-

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IN THE
Supreme Court of the United States

October Term, 1961

No. 336

BURLINGTON TRUCK LINES, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT LINE
CARRIERS, INC., *Appellees*.

No. 337

GENERAL DRIVERS AND HELPERS UNION LOCAL
554, Affiliated with The International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of
America, *Appellants*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT LINE
CARRIERS, INC., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised
Rules of this Court, Appellee Nebraska Short Line Car-
riers, Inc., moves that the judgment of the district court
be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered

on April 27, 1961, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325 dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission (Commission) awarding a motor carrier certificate of public convenience and necessity to Nebraska Short Line Carriers, Inc. (Short Line), to operate as a common carrier in the transportation of general commodities with certain exceptions over regular routes between Omaha, Nebraska, and Chicago, Illinois, and between Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate point of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska. The Commission denied the other portions of the two applications for additional rights and restricted the present application to Nebraska traffic (J. S., Appendix A, p. 4).¹

The Commission in a single report dated June 1, 1959, reversed in part and affirmed in part the hearing examiner (Carriers J. S. p. 5; Appendix B; 79 M. C. C. 599), and authorized the before-mentioned certificate. As a result of the Commission's grant of authority, appellants Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc.,

(1) The first application sought authority to transport general commodities between (1) Denver, Colorado and Chicago, Illinois; (2) Omaha, Nebraska and Chicago, Illinois; (3) Minneapolis, Minnesota and Des Moines, Iowa; (4) Council Bluffs, Iowa and St. Louis, Missouri; and (5) St. Louis, Missouri and Lincoln, Nebraska; serving all intermediate points and Waterloo and Marshalltown, Iowa. The second application sought authority to transport general commodities between Omaha, Nebraska and Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc. (Carriers) and General Drivers and Helpers Union, Local 554, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) brought an action to the district court to set aside the order. Other protestants in the Commission proceedings did not participate in the district court action.

In granting Short Line's application the Commission (Carriers J. S. p. 89; 79 M. C. C. 599) held, "We desire to make it unmistakably clear that we are not attempting to adjudicate a labor controversy." The Commission went on to say, "The Act imposes upon Common Carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs."

ARGUMENT

While the jurisdictional statements of the carriers and the Union discuss a number of questions relating to the Commission's Order the only issue is whether there was a rational basis for the Commission's decision. This Court has consistently held that orders of the Interstate Commerce Commission should not be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings and are supported by substantial evidence, even though the Court might reach a different conclusion on the facts presented. *I. C. C. v. Union Pacific*

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R. R. Co., 222 U. S. 541, 547-548, 56 L. Ed. 308, 311, 32 S. Ct. 108; *Ill. Cent. v. I. C. C.*, 206 U. S. 441.

In that the evidence and law show a truly rational basis for the conclusions of the Commission, there is nothing additional to exhaust. The Appellants have set forth in their Jurisdictional Statements certain other minor allegations, none of which have any bearing on the present case. We will discuss each briefly:

1. The carriers and the union in their Jurisdictional Statements argue that the certificate in question was issued as a result of labor disputes. The certificate in question was issued pursuant to Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)) which provides in part that a certificate shall be issued if, "it is required by the present or future public convenience and necessity:"

The Commission clearly did not issue the certificate in question to adjudicate a labor dispute. The Commission, in its report in this proceeding under review (79 M. C. C. 599, Carriers J. S. Appendix B, p. 89) stated, "We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy." In the same report (J. S. Appendix B, p. 91) the Commission stated its basis for granting said application to be,

"* * * Where as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy."

The evidence clearly showed the need for applicant's service, as summarized by the District Court.² (J. S. Appendix A, pgs. 19-20).

The Appellants also make allegations that interline service was, "available at all times" to Nebraska carriers operating between points in Nebraska and shippers and receivers of freight in Nebraska (Carriers J. S. p. 7). Such incorrectness has never before been set forth so tersely in a Jurisdictional Statement. This incorrect statement

(2) "Shippers from some fourteen towns and cities in Nebraska supported the application. Shipments of drugs requiring expeditious delivery under refrigeration were delayed; rush order shipments of automotive parts were delayed. The same is true of clothing and drug shipments, butter shipments of the value of \$18,000 to Chicago from a butter factory at Burwell, Nebraska, shipments of leather, newspapers, magazines, catalogues, advertising material, repair parts for farm machinery, truckload shipments of butter from Newman Grove, Nebraska, department store products, hardware store products and farm machinery parts from Sargent, Nebraska, hardware store supplies at Pierce, Nebraska, petroleum products, tires and accessories at Tilden, Nebraska, truck parts at Loup City, Nebraska, emergency shipments of auto parts at Neligh, Nebraska, tire shipments, seed, outboard motors, boats, marine hardware, plumbing fixtures, water softeners and related supplies, heating and air conditioning equipment, and dairy products from Kansas City, Chicago, Des Moines and St. Louis to Norfolk, Nebraska, raw materials for the manufacture of farm and industrial equipment, including corn cribs, grain bins, crop-drying machines and power steering devices from Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Illinois and Hammond, Indiana, to Columbus, Nebraska, products for a chain store organization located at Fairbury, Nebraska, receiving a wide range of commodities from Minneapolis, Chicago, Kansas City and St. Louis, wallpaper, floor coverings and other merchandise from St. Louis, Chicago, Lyons and Joliet, Illinois, Kansas City, Minneapolis, St. Paul and Des Moines, Iowa to Fairbury, Nebraska, pump jacks, cylinders, water supply equipment, windmills and plumbing supplies from various scattered centers over the middlewestern and rocky mountain states to Fairbury, Nebraska, drugs, department store commodities for Lincoln, Nebraska, heating and air conditioning equipment, various manufactured products, including frames for upholstered furniture, cabinets and television set bases, products for storage in two large warehouses, including products from large tobacco manufacturers and packing houses to, from and into Omaha from various centers over the country."

probably goes to the Commission's finding that Burlington Truck Lines, and Santa Fe Trail Transportation Company, appeared to have accepted interline traffic more or less regularly after October, 1956, when offered (J. S. Appendix A, pgs. 34-35). The Commission did not make this finding as to items that were originated on Burlington's and Santa Fe's system and routed to be interlined with Nebraska Carriers, many of which are the only common carriers to small Nebraska communities, but which were never received by such Nebraska carriers from Burlington or Santa Fe.

The district court in considering the numerous sporadic refusals of Burlington Truck Lines and Santa Fe Trail Transportation Company, stated (J. S. Appendix A, pp. 23-24):

While some trunkline carriers did not freely admit that their interchange practice after May, 1956, had been materially different from earlier practices, some others freely admitted that they had not been able to interchange with Eastern Nebraska carriers in the same free and open way they interchanged prior to 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May, 1956, a deterioration in interchange relationships and a rise in interchange difficulties. These conclusions are heavily confirmed by the testimony and exhibits shown in this record, and no one can seriously contend that the evidence of the Nebraska carriers was not founded on actual experience. The attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others, and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe, accepted almost all traffic offered. But even these carriers did not maintain the same free and open in-

terchange practices in effect before May, 1956. * * *

There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not normally provide acceptable service for much or most of the traffic which these Eastern Nebraska carriers would normally have handled."

The district court (J. S. Appendix A, p. 18) further found,

"* * * Specific instances were shown where D.M.T., Haeckel, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments."

The Commission further found (79 M. C. C. 599, 603; Unions J. S. Appendix B, p. 76),

"* * * Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers."

The facts in this matter clearly illustrate that the com-

mission did not attempt to adjudicate a labor dispute. As we will discuss later a labor dispute was nonexistent. The Commission in relation to its obligations under the provisions of the Interstate Commerce Act were concerned with the fact that the existing carriers were shown to have so conducted their operations as to result in serious inadequacies in the service to the shipping public of Nebraska. The Commission in furtherance of that duty, granted part of the application, restricted to Nebraska service, wherein the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as was necessary to carry out the purposes of the National Transportation Policy.

2. The Appellants in their Jurisdictional Statement argue that because they allege this matter involved a labor dispute that jurisdiction lies with the National Labor Relations Board and not the Interstate Commerce Commission.

The Appellants would seek to have the shipping public of Nebraska take their transportation problems to the National Labor Relations Board. Clark, the only witness who had a labor dispute did exactly that but to no avail. The National Labor Relations Board order obtained by Clark (Union J. S. Appendix C, p. 147) shows that the Teamsters are directed to cease and desist from certain secondary boycott activities against Clark "or any other common carrier by motor vehicle in the area" over which Teamsters Local 554 has jurisdiction. The protection afforded Clark was thereby extended to all other motor carriers involved in the instant proceeding. But in spite of this, the shipping public of Nebraska were unable to get service because the existing interstate carriers refused to or at least did not give service. This Court held in *Local*

1976, *United Brotherhood of Carpenters and Joiners of America, A.F.L. v. N.L.R.B.*, 357 U. S. 93,

"Since the Genuine Parts decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.* (12 Federal Carriers Cases P. 34, 179), 73 M.C.C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

"It is significant to note the limitations that the Commission was careful to draw about its decision in the Galveston case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it."

This Court in the same case held that common factors may emerge in the adjudication of these questions, but that the Interstate Commerce Commission, not the National Labor Relations Board is the one concerned with whether the carrier has performed its obligations to the shipper.

The carrier defendants in (*Carriers J. S.*, Appendix E) attempt to bring in a matter outside the record. The appellants (*Carriers J. S.*, p. 12) state:

"Even after enactment of the Landrum Griffin Act which deals with 'hot cargo' clauses, a union under-

took to obtain a modified 'hot cargo' clause. In spite of the fact that Short Line received a certificate to serve a so-called non-union segment of the shipping public, its service has also apparently been affected by recent Teamster actions. (Appendix D, pages 190-191). Whether the effect upon Short Line's service will be temporary or permanent will depend upon future action by the National Labor Relations Board and the Courts."

Short Line knew nothing about this proceeding as set forth in Appendix E, except that a picket was present but Short Line at all times continued to serve the shipping public. Short Line has never been a party to any labor proceeding and has had no labor difficulty. Short Line has in the past and will in the future, if allowed by this Court, continue to serve the public in accordance with its statutory duty even should a Union request it to voluntarily not perform that duty as was done with the Appellant Carriers by Appellant Union. The courts have consistently held that a carrier is not relieved of its duty to serve the shipping public if a picket or a strike is present or if asked not to do so by a Union. See *Pacific Gamble Robinson Co. v. Minneapolis and St. Louis Railway Co.*, D. C., 105 F. Supp. 794, 215 F. 2d 126; *Erie Railroad Co. v. Local 1286, International Longshoremen's Association*, 117 F. Supp. 157; *Montgomery Ward and Co. v. Northern Pacific Terminal Co. of Oregon*, 128 F. Supp. 475, 128 F. Supp. 520; *Consolidated Freight Lines, Inc. v. Department of Public Service*, 200 Wash. 659, 94 P. 2d 484; *Beck and Gregg Hardware Co. v. Cook*, 210 Ga. 608, 82 S. E. 2d 4; *Burlington Transportation Co., et al v. Hathaway, et al* 234 Ia. 135, 12 N. W. 2d 167; *Planter's Nut and Chocolate Co. v. American Transfer Co.*, 31 M. C. C. 719; *Merchandise Warehouse Co. v. A. B. C. Freight Forwarding Corp.*, 165 F. Supp. 67.

As set forth previously, Clark was the only one with a

picket at its place of business. The Appellant Carriers refused to serve the others who had no picket or labor difficulties. The Appellants' contention that this matter was based primarily on facts and circumstances within the exclusive jurisdiction of the National Labor Relations Board and outside the jurisdiction of the Interstate Commerce Commission is without merit.

3. The next question presented by Appellants is whether temporary interruptions of service, may be made the basis for a grant of authority. The Appellants begin with the unfounded principle that the facts show temporary interruptions of service. As seen from Clark's testimony (J. S. Appendix A, pp. 105-107) the service difficulties started in September of 1955 and were still present on April 17, 1957, the date of the last day of hearing before the Commission Examiner. Certainly this was not a temporary interruption of service as argued by Appellants. Certainly by this argument the Appellants do make the judicial admission that there was an interruption of service in the years 1956, 1957, and 1958.

The Commission pursuant to Section 207 of the Interstate Commerce Act is directed in determining applications for motor carrier certificates of public convenience and necessity to consider both the present and future public convenience and necessity.

To quote the District Court (J. S. Appendix A, p. 45): "Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service."

The Commission in its report (Carriers J. S. Appendix C, p. 92), stated:

“* * * whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term ‘present or future public convenience and necessity’ in section 207 of the act, under which the applications were filed.”

The Commission merely found the service of an additional carrier was required in order for the public to have adequate service where existing carriers in the field could not or did not desire to perform the same.

4. The Appellants argue that the proper remedy of the Nebraska shippers was to file a complaint with the Interstate Commerce Commission against the carriers in the field rather than to ask for additional service. As can be seen the Appellant carriers already had a duty to render “continuous and adequate service to the public.” The only thing that the Commission could have done was to suspend or revoke their certificate which would not have served the shipping public and would have been an extreme hardship on Appellant carriers. The Commission in *Davidson Transfer & Storage Co., et al v. U. S. et al*, 42 F. Supp. 215, at page 219 stated:

“In the case at bar, the Commission has found that the services of an additional carrier are required over the routes designated in order that the public may have adequate service. It made no finding that any of the protestants were derelict in their duties, but even if the Commission had made such a finding, we would not conclude that the Commission was thereby prohibited from authorizing an additional, and, if need be, a competing carrier to operate in the field.

We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service and there is nothing in any of the sections cited or in their legislative history that would require a contrary conclusion."

The appellants take inconsistent positions when they argue that this matter was exclusively within the jurisdiction of the NLRB and later argue this matter should have been handled by a complaint filed with the Interstate Commerce Commission. Neither action would have provided the service needed by the Nebraska shipping public.

In summary the only issue present is whether there is a rational basis for the Commission's finding. It is not whether this Court may have reached different findings on the record. Under the evidence in this case we submit that where the shipping public of Nebraska was desperate for service as shown by witnesses who numbered in excess of 63 that the appellant carriers who refused the Nebraska traffic will not be hurt in that they do not desire to handle the traffic or they would have done so before the filing of this application. If they are not now enjoying the traffic, it is obvious that they can not be affected by the granting of the instant application. It is quite obvious that the applicant with the operating restrictions imposed upon its certificate could never be a serious competitor of the Appellant carriers, but the certificate in question does permit and does allow the shipping public of Nebraska the service that they so desperately need.

CONCLUSION

The appeal presents no substantial question and the

judgment of the District Court is correct and should, without further briefs or argument, be affirmed.

Respectfully submitted,

ROBERT A. NELSON

J. MAX HARDING

DUANE W. ACKLIE

605 South 12th Street

Lincoln, Nebraska

*Attorneys for the Appellee,
Nebraska Short Line Car-
riers, Inc.*